ANNA TAY SIEW HONG

v.

JOSEPH NG TIONG YONG

HIGH COURT MALAYA, JOHOR BAHRU
DATO' MOHD. GHAZALI BIN MOHD. YUSOFF JC
[DIVORCE PETITION NO. 39 OF 1983]
1 MAY 1995

FAMILY LAW: *Maintenance order - Application for rescission of order - Material change in circumstances - A question of fact.*

The petitioner and the respondent were divorced on 4 August 1988 and a maintenance order was made accordingly. Subsequently, the petitioner obtained leave to issue a judgment summons against the respondent for having defaulted in his payments for the maintenance. The respondent filed an application for an order to rescind the said maintenance order on the ground that there had been material change in circumstances since the Court order. When the respondent was examined on oath as to his means it was deduced that the respondent was 60 years of age and suffering from several ailments, having no permanent work nor property and dependent on his second wife for financial support. The issue for the Court to decide was whether there had been material change in his circumstances.

Held:
Whether there has been material change in circumstances is a question of fact. The respondent has been paying maintenance at RM500 per month since August 1986 up to November 1994 which makes it a total of RM50,000. He is now 60 years of age and based upon the evidence, he is in poor health. The facts reveal that he has no special skill which could at least assist him in obtaining employment; furthermore his poor eyesight and his age are minus factors if he now seeks employment. He now depends upon his second wife for financial support; there is nothing to show that he owns property which can be capitalised to meet the monthly payments to the petitioner. On the other hand, the petitioner seems to be comfortable and well-looked after by their married daughter. She can even afford to seek medical attention in Singapore which is available in Malaysia and probably at a lower cost. Based on the above, there have been material changes in the circumstances which would entitle the Court to rescind the maintenance order.

[Application allowed; each party to bear its own costs].

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 83, 86
Divorce and Matrimonial Proceedings Rules 1980, r. 73(5)(b)

For the plaintiff - Ang Boon Heng; M/s. H.H. Long & Co.
For the respondent - Ong Peck Ha; M/s. Ong & Ong

JUDGMENT

Mohd. Ghazali bin Mohd. Yusoff J:

Both these applications (encls. 3 and 5) which were made under the Law Reform (Marriage and Divorce) Act, 1976 (hereafter referred to as "the said Act) were heard together at the request of both parties.

The parties were married on 23 May 1953 and divorced on 4 August 1988. On 10 November 1986, that is, prior to the *decree nisi* being made absolute, the Court, by consent, ordered *inter alia*, the following:

(a) that the respondent do pay to the petitioner monthly maintenance of RM500 commencing 1 August 1986, and

(b) that the respondent do transfer to the petitioner all his 253/1038 undivided share in the property comprised in Geran No. 13645 Lot No. 2552, Bandar Maharani, Johor.

In 1994, the petitioner obtained leave to issue a judgment summons (encl. 3) against the respondent for having defaulted in his payments for maintenance and consequently the respondent filed an application (encl. 5) for an order to rescind the said maintenance order. In accordance with the Divorce and Matrimonial Proceedings Rules 1980 (hereafter referred to as "the said Rules") the respondent was examined on oath as to his means. The respondent explained that he is suffering from several ailments and currently has no permanent work; since the divorce in 1988 he has been working as a petition writer and has no regular income. He explained that his income is now between RM100 to RM300 per month and at times even less than that. He admits he has been very irregular in making the monthly payments to the petitioner and explained that he can no longer afford to do so. He stated that he had even gone to the extent of borrowing money to meet the monthly payments to avoid having a judgment summons issued against him as he is fearful of being committed to prison for non-payment.

He explained that in 1974, whilst he was married to the petitioner, he married another woman and is currently dependent upon the latter for financial support. He does not own any property now as everything he owned has been sold. He admits that he used to gamble at the casino in Genting Highlands, Malaysia but has ceased such activities five years ago. He has two children from his second marriage and admits that both are studying in Australia but states that they are being supported by his second wife, who is now 55 years old and has retired from her job - she was a "nursing sister". She had sold her property to maintain the two children and is now doing odd-jobs to meet their living expenses.

He added that he is now 60 years old and claims that he is in poor health. To support his claim, he produced a letter from his doctor which states that he is suffering from gout since 1970, diabetes since 1973 and has mild hypertension since 1990. He also produced another letter from a consultant eye surgeon which states that his eyesight (right eye) is failing and is now restricted only to sighting of hand movements.

The respondent pointed out that the petitioner is now living comfortably with their daughter from that marriage and that the daughter is married to a person who is employed at managerial level in a company. He contended that there have been material changes in the circumstances since the Court order in 1986 wherein he had consented to pay monthly maintenance in the sum of RM500 and prays that the said order be rescinded.

In her affidavit the petitioner has contended that she is also in poor health and to support her contention has attached to her affidavit a bill for S$1,850 issued by Mount Elizabeth Hospital Ltd., Singapore which shows that she had undergone a thyroid operation in 1992 and was admitted for one night at the said hospital. She further contended that the respondent can afford to pay the monthly maintenance and to support her contention has attached to her affidavit three copies of envelopes used by the respondent to send her the monthly payments; she argued that these envelopes were obtained from hotels in Hong Kong, Singapore and Genting Highlands, Malaysia and as such is proof that the respondent can

afford to travel overseas. However, when he was examined on oath, the respondent explained that he had collected these envelopes as souveniers several years ago, when he could afford to travel, and had since kept them. He is now using these envelopes to prevent wastage.

It is not disputed by both parties that the respondent has stopped paying maintenance since December 1994. Section 86 of the said Act provides that arrears of unsecured maintenance shall be recoverable as a debt from the defaulter and s. 83 of the said Act provides that the Court may at any time vary or rescind any subsisting order for maintenance on the application of the party against whom the order was made where there has been any material change in the circumstances. Rule 73(5)(b) of the said Rules provides that on the hearing of the judgment summons the Judge may, where the order is for periodical payments and it appears to him that the order would have been varied or suspended if the debtor had made an application for that purpose, make a new order for payment of the amount due under the original order, together with the costs of the judgment summons, either at a specified time or by instalments.

It is my view that whether there has been any material change in circumstances is a question of fact. The respondent has been paying maintenance at RM500 per month since August 1986 up to November 1994 which makes it a total of RM50,000 i.e., RM500 x 100 months. He is now 60 years of age and based upon the evidence, I find that he is in poor health. The facts reveal that he has no special skill which could at least assist him in obtaining employment; furthermore, his poor eyesight and his age are surely minus factors if he now seeks employment. He now depends upon his second wife for financial support; there is nothing to show that he owns property which can be capitalised to meet the monthly payments to the petitioner. On the other hand, the petitioner seems to be comfortable and well-looked after by their married daughter. She can even afford to seek medical attention in Singapore which, in my opinion, is available in Malaysia and probably at a lower cost. The maintenance order in 1986 was made by consent of both parties and this would imply that the respondent is a responsible person. He was even willing to part with his property (referred to earlier).

I find that there is nothing to show that the respondent has acquired any property since the divorce. The envelopes which were obtained from the various hotels and used by the respondent to send the monthly maintenance payments all bore post-marks which denote that they were posted in Muar, Johor and do not at all imply that the respondent presently can afford to travel to Hong Kong or Singapore or to Genting Highlands. I accept his explanation that he had kept these envelopes as souveniers and is now using them to prevent wastage.

Based upon the above, it is my finding that there have been material changes in the circumstances which would entitle the Court to rescind the maintenance order. As such, I would order that the said maintenance order dated 10 November 1986 be rescinded with effect from 31 May 1995. With regard to this application (encl. 5), I would order that each party bear its own costs.

With regard to the judgment summons (encl. 3), it is clear that the respondent is in arrears for a period of six months, that is, from December 1994 to May 1995, making it a total of RM3,000. I am of the view that the respondent is not in a position to pay the arrears in a lump sum and that being so, I would order that he pay the arrears at the rate of RM150 per month with effect from 1 June 1995 and that there be no order as to interest and cost.